rule is an illogical and inexpedient limitation on a useful remedy, in spite of the fact that a Federal court has ignored the *Crawshay* case and gone back to earlier precedents,[36] and that in some states which have re-established interpleader at law, privity has been declared unnecessary,[37] the conservative tendency of our courts makes it improbable that the rule in the equitable action will be changed, except by statute.

THE ADMISSIBILITY OF HEARSAY EVIDENCE IN BOUNDARY DISPUTES.—Under the exception to the Hearsay Rule which admits reputation to prove matters of public interest, evidence as to the reputed location of public boundaries, *i. e.*, boundaries of counties, towns, highways, etc., is everywhere received.[1] The English courts, construing the exception strictly, have declined to extend it to cases of private boundaries,[2] unless coinciding with such as are public.[3] In the United States, however, outside of Massachusetts and Maine, which adhere to the English view,[4] the exception has been quite generally relaxed to meet local needs. Thus, in a few states, *e. g.*, New York and California, reputation is admitted to prove the boundaries of private grants of a notorious and extensive character;[5] while others admit reputation in all cases.[6] Introduced because of the unavailability of other proof, this extension in its origin finds support in the interest of a rural community in boundaries,[7] the reason for admitting reputation in any case being the trustworthiness gained from the interest and consequent information of the public.[8]

Influenced by the same considerations of necessity, a number of American courts, chiefly in the South and the Northeast, developed a new exception to the hearsay rule, by force of which the declarations of deceased persons, having peculiar means of knowledge and without interest to misrepresent, are admissible on any question of boundary public or private.[9] This exception has no place in English law which excludes a declaration if based solely on personal knowledge.[10] The trustworthy nature of similar declarations has, however, been admitted by English judges,[11] and the exception might have gained a foothold in England were it not for the tendency there prevailing to oppose further breach of the Hearsay Rule.[12] Safeguarded by the disqualification from interest and the freedom of the jury to weigh the credibility of the declarations, this extension appears legitimate. For obvious reasons, however, it is proper to qualify the requirement of "means

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[36]Bank *v.* Skelton, *supra.*

[37]Boyle *v.* Manion (1896) 74 Miss. 572; *contra,* Ins. Co. *v.* Kidder (1904) 162 Ind. 382.

[1]See Wigmore, Ev. §§ 1582-1588 incl., *passim.*

[2]Clothier *v.* Chapman (1805) 14 East 331 n.

[3]Thomas *v.* Jenkins (1837) 6 A. & E. 525.

[4]Chapman *v.* Twitchell (1853) 37 Me. 59; cf. Hall *v.* Mayo (1867) 97 Mass. 416.

[5]Morton *v.* Folger (1860) 15 Cal. 275, 279; McKinnon *v.* Bliss (1860) 21 N. Y. 206.

[6]Wigmore, Ev. § 1587, and cases cited in note 7.

[7]Cf. Harriman *v.* Brown (Va. 1837) 8 Leigh 697.

[8]Morewood *v.* Wood (1811) 14 East 327.

[9]Spear *v.* Coate (S. C. 1825) 3 McCord 227; Higley *v.* Bidwell (1833) 9 Conn. 447; Great Falls Co. *v.* Worster (1844) 15 N. H. 412; Scoggin *v.* Dalrymple (N. C. 1859) 7 Jones L. 46; Stroud *v.* Springfield (1866) 28 Tex. 649.

[10]Outram *v.* Morewood (1793) 5 T. R. 121.

[11]Cf. remarks of Mellish, L. J. in Sugden *v.* St. Leonards (1876) L. R. 1 P. D. 154; of Cockburn, L. C. J. in R. *v.* Bedingfield (1879) 14 Cox Cr. 342; and of Herschell, L. C. in Woodward *v.* Goulstone (1886) L. R. 11 App. Cas. 469.

[12]See opinion of Blackburn, J., in Sturla *v.* Freccia (1880) 5 App. Cas. 623.

of knowledge" by adding "such that it might properly be inferred that the declarant had actual knowledge."[13]

This exception has been confused with an anomalous rule in force in Massachusetts. That rule, professedly based on the doctrine of *res gesta* or of verbal acts,[14] is inconsistent with both in that the death of the declarant must be shown,[15] and from the latter in that the declaration is introduced to prove the truth of the matter stated, not to characterize any act[16] The declarant must, at the time of the declaration, have been (1) on the land, engaged in pointing out the boundaries; and (2) in possession as owner.[17] Some courts, apparently fearing the result of the rule admitting generally declarations of deceased persons with peculiar means of knowledge, have seized upon these qualifications to a varying extent. The first limitation, though repudiated in New Hamphire[18] and Vermont[19] has been accepted in Maine,[20] New Jersey,[21] and Pennsylvania,[22] and approved by the United States Supreme Court.[23] Pennsylvania, however, seems to admit the declarations of one who has surveyed the land, irrespective of this requirement,[22] and the Supreme Court allows marking of the boundaries or discharging some duty relating thereto as a substitute for pointing out.[23] The second limitation, which has been adopted only in Maine[20] and New Jersey,[21] is, on its face, inconsistent with the exception admitting declarations of deceased persons who had no interest to misrepresent, the latter requirement clearly excluding the declarations of an owner as self-serving.[24] Massachusetts, incompatibly with the *res gesta* rule, does, indeed, make interest a disqualification, but the only example of a declaration so to be excluded is one uttered *post litem motam*.[25]

A recent New Hampshire case illustrates the clouded state of the judicial mind in this respect. To prove the proper location of a fence along the right of way of the defendant railroad, the plaintiff was permitted to introduce the declarations of two deceased persons, made while acting as foremen in charge of the defendant's fences, on the ground that they "presumably knew where the division line between the plaintiff's and defendant's property was." *Keefe* v. *Sullivan County R. R.* (N. H. 1908) 71 Atl. 379. Had no other facts appeared, this application of the above exception would undoubtedly have been correct, and, probably, reputation evidence would also have been admissible under the New York rule, because of the extensive and quasi-public nature of the boundary in dispute. But it was shown that one of the foremen, at the time of the declaration, was the owner of the adjoining premises, and that the declaration was to his interest. Never-

[13]Wood *v.* Willard (1864) 37 Vt. 377. And see Clements *v.* Kyles (Va. 1856) 13 Gratt. 478.
[14]Van Deusen *v.* Turner (Mass. 1832) 12 Pick. 532.
[15]Flagg *v.* Mason (Mass. 1857) 8 Gray 556.
[16]8 COLUMBIA LAW REVIEW 43.
[17]Daggett *v.* Shaw (Mass. 1842) 5 Metc. 223; Bartlett *v.* Emerson (Mass. 1856) 7 Gray 174.
[18]Smith *v.* Forrest (1870) 49 N. H. 230.
[19]Powers *v.* Silsby (1868) 41 Vt. 288.
[20]Royal *v.* Chandler (1888) 81 Me. 118; Wilson *v.* Rowe (1899) 93 Me. 205.
[21]Curtis *v.* Aaronson (1886) 49 N. J. L. 68.
[22]Bender *v.* Pityer (1856) 27 Pa. St. 333.
[23]Hunnicutt *v.* Peyton (1880) 102 U. S. 333, at 362.
[24]Shepherd *v.* Thompson (1827) 4 N. H. 213; Lasser *v.* Herring (N. C. 1832) 3 Dev. L. 340. Cf. Wigmore, Ev. § 1566.
[25]Bartlett *v.* Emerson, *supra*.

theless, it was held, relying on an earlier decision,[26] that the objection of interest on the ground of ownership went to the weight and not to the competency of the evidence, inasmuch as by statute all persons interested had become competent witnesses. This application of the statute is not only irreconcilable with the requirements of the exception, as above pointed out, but it also involves a misunderstanding of the *rationale* of the statute relied upon. A statute of this kind presupposes an opportunity to weigh a witness' measure of credit, as well as the means afforded for doing so by cross-examination, and the like.[27] These safeguards, which alone justify the risk of admitting interested witnesses, are absent in the case of the declarations of interested persons who are deceased, and the action of the New Hampshire court in extending the statute to such a case was clearly indefensible.

CANCELLATION AND CLOUD ON TITLE.—Although the jurisdiction of equity to cancel an instrument is said to be discretionary,[1] it is now governed by certain recognized principles.[2] First, if the instrument would be valid if sued upon at law, equity will not cancel unless there appear grounds for which, according to established principles, equity will give affirmative relief, e. g., fraud, mistake, etc.[3] This is the meaning of the occasional assertion,[4] "where the complainant's defense is purely equitable, cancellation will be decreed." A defense "purely equitable," however, is not one which would be a defense to an action for specific performance,[5] although it has been so considered,[6] and cancellation given in a case of mere hardship.[7] In the second place, if the complainant's defense is one which would be accepted by a court of law, there must appear other circumstances by reason of which the protection of the law courts would be inadequate.[8] Such circumstances may show, for example, danger that the defense may become unavailable by the time suit is brought on the instrument, that, if negotiable, the instrument may pass into the hands of an innocent purchaser, or that the instrument clouds the complainant's title to realty.[9] These two grounds for equitable relief are sometimes confused.[10]

The basis of relief for cloud on title is the existence of a semblance of title or interest, in fact unfounded, but, while allowed to continue, prejudicial to the marketability of the property.[11] In determining whether a claim is one affecting marketability, the view clearly most in accord with equitable principles is that recognized by some jurisdictions according to which relief is granted when the instrument does in fact depreciate the market value

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[26]Lawrence *v.* Tennant (1888) 64 N. H. 532, 541; followed in Nutter *v.* Tucker (1892) 67 N. H. 185.
[27]Wigmore, Ev. § 576 (2).

[1]Hamilton *v.* Cummings (1815) 1 Johns. Chan. 517.
[2]Gunter *v.* Thomas (N. C. 1840), 1 Ired. Eq. 199; Lynch's Appeal (1887) 97 Pa. St. 349.
[3]Pom. Eq. Rom. § 684.
[4]Venice *v.* Woodruff (1875) 62 N. Y. 462.
[5]Day *v.* Newman (1788) 2 Cox Eq. 77; Twining *v.* Morrice (1788) 3 Bro. Ch. 326; Stewart's Appeal (1875) 78 Pa. St. 88.
[6]Smith *v.* Hughes (1880) 50 Wis. 620; ch. Kirby *v.* Harrison (1853) 2 Oh. St. 326.
[7]Esham *v.* Lamar (Ky. 1849) 10 B. Monroe 43.
[8]Hoare *v.* Brembridge (1872) L. R 14 Eq. 522.
[9]Field *v.* Holbrook (N. Y. 1857) 14 How. Pr. 103.
[10]Hamilton *v.* Cummings, *supra.*
[11]Rigdon *v.* Shirk (1889) 127 Ill. 411.